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In the Supreme Court of the United States

OCTOBER TERM, 1977

COLON BROWN AND J. P. NICELY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioners' convictions.

2. Whether the legal standards set forth by the court of appeals deprive petitioners of due process of law.

STATEMENT

This petition, like our petition in No. 76-1560, *United States* v. *United States Gypsum Co.*, presents questions arising out of a complicated antitrust trial. The statement of facts here supplements the statement in our petition.

1. On December 25, 1973, a grand jury in the Western District of Pennsylvania indicted petitioners, eight other persons, and six corporations, for conspiracy in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1. Among other things, the indictment charged that petitioners fixed the prices and the terms and conditions for sale of gypsum board, beginning prior to 1960 and continuing to the time of the indictment. Petitioner Brown has been chairman of the board and chief executive officer of defendant National Gypsum Company ("National") since 1965 (Pet. App. 3a; App. 3467a-3468a, 49ex).[1] Petitioner Nicely, a sales manager with National from 1960 to 1964, became Vice-President of Sales in 1965 (Pet. App. 3a; App. 49ex).[2] National was the second largest producer of gypsum board, with a 24 percent share of the market between 1960 and 1974 (App. 50ex).

2. Evidence established the participation of both Brown and Nicely in the conspiracy.

a. The major gypsum board producers, including National, engaged in a pattern of predatory conduct against Texas Gypsum Company, a small producer, from 1960 to 1965, because Texas Gypsum refused to adhere to the uniform delivery terms adopted by the major producers.[3] After Texas Gypsum made its first sale in the Dallas

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[1]"App." refers to the Appendix in the court of appeals.

[2]Nicely's position was changed from corporate vice-president to divisional vice-president in July 1968 (App. 49ex), but his responsibility with respect to sales of gypsum board (including a "consultant" function relating to prices (App. 3381a-3383a)) remained unchanged (App. 3374a-3380a).

[3]See generally the testimony of Claude Huckleberry, founder and former president of Texas Gypsum (App. 929a-1076a). Specific references to National's participation in the predatory practices appear at App. 938a, 942a, 1689ex, 947a-949a, 955a, 1023a.

market to Groves Lumber Company in December 1961 (App. 888a-889a, 936a), the manager of Groves, John Tinsley, was visited by a National salesman, who asked for a sample of the Texas Gypsum product (App. 893a-894a), and then by Nicely himself in March 1962 (App. 895a-897a). Tinsley asked Nicely why Texas Gypsum was "given such a bad time" in every market that they entered. Nicely replied that "there was a policy of containment aimed, directed at Texas Gypsum Company," and further that "they knew what the cost was of Texas Gypsum Company, their manufacturing costs, and they knew what they had to get it down to where they could keep him out of the market" (App. 898a).[4]

b. In 1965 the gypsum board industry suffered from substantial overcapacity (App. 1215a, 67ex, 71ex), declining demand (App. 1215a),[5] and increasing competition from new producers (App. 1215a, 389ex-390ex), which had led to widespread discounting, extended credit terms, and competition in delivery services and allowances (App. 3587a, 67ex, and 480ex). Despite this market disequilibrium, between November 17 and December 2, 1965, all of the major gypsum producers announced a strict no-discount policy on prices, effective December 15, 1965 (App. 557ex-566ex). Two months later, between January 25 and February 14, 1966, they announced new, identical cash discount and credit terms, and the elimination of extended credit terms for all buyers, effective March 1, 1966 (App. 1036ex-1046ex).

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[4]Tinsley was so upset by that statement that thereafter he purchased gypsum board only from Texas Gypsum (App. 901a-902a).

[5]Industry sales fell nearly 9 percent from $354.7 million in 1964 to $323.6 million in 1965, and continued down to $312.4 million in 1966 (calculated from App. 50ex).

Executives of United States Gypsum Company considered their December 1965 pricing strategy so risky that they sought prior approval of it from their board of directors, an unprecedented step (App. 3228a-3229a, 582ex-589ex). Petitioners testified that their decision to follow this United States Gypsum pricing lead was made within hours of its public announcement (App. 3459a-3460a, 3465a, 3591a);[6] internal National documents, which petitioner Nicely admits he helped to prepare (App. 3459a-3460a), show that National had prior notice of it.[7] Petitioner Brown had spoken several times with Graham Morgan, then president of United States Gypsum, during 1965, to discuss patent litigation and "other subjects of mutual interest" (App. 3467a-3468a, 3503a, 643ex, 3489a). Brown admitted deciding to centralize in him-

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[6]Compare this precipitous decision with the elaborate consideration petitioners gave to following a relatively simple list price increase. App. 2580a-2581a, 2174ex-2176ex.

[7]These documents, three drafts of a "Plan of Action" for National's own announcement, show that National intended to procure United States Gypsum's announcement and full price list on November 17 (App. 594ex-596ex). Securing those documents from dealers by that date would have been feasible if United States Gypsum had published its announcement, as earlier planned, on November 15 (App. 442ex, 451ex, 459ex). Petitioners assert that one of their field personnel in Chicago secured a copy of the announcement and an internal United States Gypsum memorandum from a dealer on the morning of November 17, dictated their contents to National's headquarters by telephone, and then mailed them in (App. 1588a, 2554a-2556a, 3460a, 3590a-3591a, 609ex-613ex). The announcement, however, was not sent out by United States Gypsum until November 17 (App. 557ex), and according to the postmark the National employee did not mail his copy to headquarters until the afternoon of November 18, when he sent it airmail special delivery (App. 2559a-2560a, 613ex).

These documents were the basis for finding National liable in *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295, 321-323 (N.D. Cal.).

self authority to allow discounts (App. 3591a-3592a), a step United States Gypsum also had taken but had not made public (App. 1152a-1155a, 459ex).

Upon implementation of their no-discount policy in December 1965, United States Gypsum, National, and Georgia-Pacific[8] began to keep a very close watch on prices (App. 1573a, 481ex, 612ex), and National adopted a new form for its personnel to report competitive activities (App. 1572a-1573a, 812 ex). In order to implement the no-discount policy, the major producers ignored the competition of the minor or "single-plant" producers.[9] When some other major producers began to meet the single-plant competition on a spot basis in May 1967 (App. 2569a-2570a, 1374ex), petitioner Brown ordered a $2 reduction in National's list price (App. 3568a-3570a, 2125ex-2126ex). The reduction was limited to items subject to single-plant competition (App. 2676a-2678a), and the announcement made it clear that National intended to continue to sell only at list price (App. 2125ex). National initiated price increases of $3.75 in the East and $2.25 in the West later in the year (App. 2574a-2576a), which were followed with some adjustments (and very little discounting) by the other major producers (App. 1329ex-1330ex, 1375ex-1381ex).

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[8]Georgia-Pacific Corporation, the third largest producer, had announced its price change simultaneously with National on November 24, 1965 (App. 559ex-560ex).

[9]The theory of the major producers was that the smaller ones simply did not have the production capacity to make a refusal to compete unprofitable (App. 480ex, 1573a-1574a, 816ex-818ex). The policy of not meeting "single-plant" competition, adopted by United States Gypsum (App. 458ex-459ex), was also followed by National (App. 811ex) and Georgia-Pacific (App. 839ex) although it was never made public (App. 1154a).

United States Gypsum and National also had been troubled by competition in credit policies and had been conducting studies of those policies during 1965, while Morgan and petitioner Brown were meeting (App. 892ex-911ex, 931ex, 589ex, 954ex-962ex). In August 1965, when National's treasurer protested to Brown that a tightening of credit terms was not feasible because of competitive pressures, Brown replied that (App. 1893a-1894a, 3617a-3621a, 896ex):

> * * * a decision of this nature concerning the industry falls within the prerogative of the Parent Company top management supported by the Senior Vice President of Sales [John Brown] whose function is one primarily directed to industry relationships.

On December 10, 1965, petitioner Brown met with Robert Fredericks, head of Georgia-Pacific's gypsum division (App. 3549a-3551a, 34ex, 36ex, 636ex), and the same day issued a memorandum instructing his aides to expedite work on new credit terms (App. 915ex).

Fredericks went on to meet with defendants Morgan and Andrew Watt, Executive Vice President of United States Gypsum (App. 1123ex), and about January 20, 1966, reported to his superiors that credit terms were being studied both in Georgia-Pacific's gypsum division "and in the industry" (App. 1396a-1398a, 943ex-944ex). United States Gypsum publicly announced its revised terms on January 26, 1966 (App. 1046ex). National followed suit only six days later (App. 1036ex-1037ex).

Petitioner Nicely was involved from the beginning in National's planning for revision of credit terms (App. 3456a-3457a, 802ex, 897ex). Credit personnel sought his concurrence (App. 3622a-3623a, 895ex), and he approved both the new credit terms and the transition policy (App.

1053ex). Both the earlier draft credit terms and the transition program finally adopted had significant unpublished provisions identical to those being considered or adopted by National's competitors,[10] and one policy memorandum approved by Nicely showed on its face contacts with competitors (App. 1055ex-1056ex).

The credit terms adopted by the major producers effective March 1, 1966, were maintained until the time of the indictment (App. 1425a, 1960a, 2020a-2021a, 2131a-2132a, 2069ex).

c. It was the practice of National and the other corporate defendants during the 1960s and 1970s to exchange current price and credit term information. This practice, which continued at National until at least 1971 (App. 1722a, 2024a-2025a, 1117ex), had both the purpose and effect of stabilizing prices (App. 547a-549a, 1518a-1520a, 1695a-1697a).

Brown and Nicely approved the exchange of price and credit term information with competitors (App. 1706a, 1709a, 3398a-3401a). Contrary to his present assertion (Pet. 7), petitioner Brown was aware that the practice was not being used merely to establish a defense to a charge of price discrimination or to protect against sharp bargaining by customers. He knew that prices were being exchanged while National had a policy of not deviating from

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[10]United States Gypsum, National and Georgia-Pacific all considered, but rejected, the use of a one percent penalty for late payments (App. 1397a-1398a, 943ex, 1903a-1904a, 2131ex, 953ex), and the transition programs for the major companies were virtually identical, though their terms were never publicly announced (App. 1922a-1997a, 1048ex para. 3, 1051ex-1061ex). One document from National's files (App. 1050ex) shows a number of items of non-public information from United States Gypsum, including the latter's transition policy (compare para. 3 with 1048ex), the number of outstanding extended accounts (para. 7 with 961ex-962ex), and the existence of a grace period for mailing (para. 8 with 1047ex).

its list prices or standard credit terms, and he had assumed the sole power to authorize such deviations (App. 1709a, 3555a-3557a, 3562a-3563a). Consequently, the exchange of price information would have detected price cuts by competitors but could not have been used to establish a defense to price discrimination charges.

Nicely admitted that he was aware of the practice from 1965 to 1969 (App. 3401a), and his present contention that he never specifically directed price verification (Pet. 12) is contradicted by the testimony of one of his former subordinates (App. 1705a-1706a).

3. The court of appeals observed that it did not view the government's case skeptically, and it stated that there was evidence to support the government's position that the defendants had conspired with the purpose of stabilizing prices (Pet. App. 9a, 11a). The court remanded the case for a second trial, however, holding that the district court had committed the legal errors discussed in our petition.

ARGUMENT

1. Petitioners contend that no evidence at all was introduced to support their convictions (Pet. 16). They argue that the court of appeals should not have ordered a second trial. There is no reason for this Court to consider petitioners' arguments. The evidence recited above, when taken in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), amply supported the jury's finding that petitioners knowingly participated in the conspiracy to fix the prices and terms of sale of gypsum board. It also established that petitioners' participation continued into the five-year period of limitations before the indictment; petitioners adhered to terms agreed upon and their agreement to exchange information on pending sales, which served as a means of policing compliance

among the conspirators. Because their deeds extended into the period of limitations, the jury was entitled to consider their acts throughout the duration of the conspiracy.

The jury was not bound by the self-serving protestations of innocence cited in the petition or by the absence of direct evidence of an agreement among the conspirators. "It is elementary * * * that conspiracies are seldom capable of proof by direct testimony and may be inferred from those things actually done" (*Eastern States Lumber Association* v. *United States*, 234 U.S. 600, 612). See also *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 211.

Petitioners' contentions boil down to a routine assertion of factual error, and "review would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 270. Moreover, the court of appeals has not rendered a final decision against petitioners; it reversed their convictions and remanded for a new trial. If this Court should grant review in No. 76-1560 to consider the court of appeals' legal conclusions, and if it should reverse the court of appeals' judgment, that court would be free to consider more fully petitioners' evidentiary arguments, which it did not discuss in detail in light of its reversal on other grounds.[11] See *United States* v. *Pomponio*, 429 U.S. 10, 13. This Court need not consider the ordinary evidentiary contentions raised by petitioners.

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[11]The court noted that the government had shown deliberate antitrust violations (Pet. App. 9a, 11a). Petitioners infer from a comment of Judge Hunter that the court of appeals considered the evidence against Brown to be weak (Pet. 4-5, referring to Pet. App. 27a). The other two judges, however, dissociated themselves from that part of Judge Hunter's opinion (Pet. App. 24a n. 11), and Judge Hunter himself did not suggest that the evidence concerning Brown would not be sufficient to support a conviction under a proper charge.

2. Petitioners' further contention (Pet. 24) that the court of appeals "perpetuated" an "erroneously retroactive application" of the Sherman Act by the district court is groundless.

Petitioners argued in the lower courts that the exchange of information among competitors on pending price offers did not violate the Sherman Act if done in good faith for the purpose of establishing a "meeting competition" defense under Section 2(b) of the Robinson-Patman Act, 38 Stat. 730, as amended, 15 U.S.C. 13(b), or of protecting against "customer fraud" (Pet. 26). The district court rejected this proposition. It instructed the jury that such an exchange of information could constitute a violation if it had either the purpose or the effect of stabilizing prices, and that a good faith purpose of establishing a Robinson-Patman defense would negate an unlawful intent but would not be a defense if the exchange had the effect of stabilizing prices (Pet. App. 11a n. 6). A majority of the court of appeals reversed because it concluded that exchanges of price information for the purpose of "complying" with the Robinson-Patman Act would not be illegal under certain circumstances even if prices were stabilized.[12]

The court of appeals did not create new "retroactive" law in rejecting petitioners' contention that a good faith intent to take advantage of the "meeting competition"

[12]The court of appeals held that (Pet. App. 23a):

> • • • appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue.

defense under the Robinson-Patman Act is a complete defense to a Sherman Act charge. This Court held in 1921 that an exchange of price information among competitors regarding specific prices for specific customers is illegal if it has a tendency to stabilize prices and suppress competition. *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, 400. Accord, *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 389.

Any reliance petitioners may have placed on *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563, and *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588, was unwarranted. Both *Maple Flooring* and *Cement* emphasized that the price information exchanges involved there were limited to completed transactions and had no tendency to suppress competition. *Maple Flooring*, *supra*, 268 U.S. at 585-586; *Cement*, *supra*, 268 U.S. at 604-606. Thus, when this Court held in *United States* v. *Container Corp. of America*, 393 U.S. 333, that an agreement to exchange price information that resulted in stabilizing prices violated the Sherman Act regardless of the intent behind the exchange, it was not establishing new law but merely applying long-established principles to the particular facts of that case. It is no novel doctrine that "a good intention will not save an otherwise objectionable regulation" (*Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238).[13]

[13]Our petition in No. 76-1560 contends that the court of appeals' decision is more favorable to petitioners than prior decisions of this Court warrant. The four-part test of which petitioners complain (Pet. 31-32) establishes a *defense* for price exchanges that are otherwise criminal, not a new basis of liability. The defense so established is not justified. Moreover, the first of the other cases cited by petitioners as validating their price exchange agreement (Pet. 26 n. 3) was not decided until 1971 and had no effect on their practices. This Court has

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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not, in any event, endorsed any of those cases, and petitioners were not entitled to rely on them.

Petitioners suggest that "the Sherman Act itself is so vague that it inadequately defines the elements of the crime with which defendants were charged" (Pet. 28 n. 6). That proposition has long since been decided adversely to them. *Nash* v. *United States*, 229 U.S. 373, 376-378. Even if the law were less clear than it is, it would not be unconstitutional as applied to petitioners.

> • • • Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

United States v. *Wurzbach*, 280 U.S. 396, 399. See also *United States* v. *Powell*, 423 U.S. 87, 93. Petitioners knowingly came close to, and indeed overstepped, the line separating the legal from the illegal. That line has not undergone an avulsive change making the rule less favorable to petitioners (cf. *Marks* v. *United States*, No. 75-708, decided March 1, 1977). The most petitioners can say is that the law has gradually become more clear. That, however, is often true in criminal cases, and it is not a sufficient reason to withhold application of the criminal sanction.